

December 22, 2016

VIA FOIAONLINE.REGULATIONS.GOV

U.S. Environmental Protection Agency

Re: Freedom of Information Act Request: Flooding of Animal Confinement Operations in North Carolina

Dear FOIA Officer:

This request is made under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (FOIA) by the Center for Biological Diversity (Center) on behalf of the Center and Waterkeeper Alliance (Waterkeeper). The Center is a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process. Also a non-profit organization, Waterkeeper supports a global network of grassroots leaders to hold polluters accountable and fight for every community's right to swimmable, drinkable, and fishable waters.

REQUESTED RECORDS

The Center requests the following records from the U.S. Environmental Protection Agency (EPA):

1. All records, including all communications with the North Carolina Governor's office, any state agency, or between Region 4 and any other EPA regional office or the DC office, generated as part of EPA's review, consultation, or response to flooding of animal agricultural operations in North Carolina as a result of Hurricane Matthew.
2. All records related to any emergency response or preparedness plan, proposal, strategy, suggestion, or other response resulting from any storm-related flooding of any animal agricultural operation in North Carolina as a result of flooding from Hurricanes Matthew, Floyd, Bonnie, or Fran.

For purposes of this request, "records" is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained. All of the foregoing is included in this request if it is in EPA's possession and control. If such records are no longer under the control of EPA

but were at any time, please refer this request to the relevant federal agency or agencies. This request is being sent to Region 4 with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

If you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

In addition, if you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily-accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily-accessible” means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Please provide all records in a readily-accessible, electronic .pdf format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or if that is not possible; (2) in .pdf format, without any “profiles” or “embedded files.” Profiles and embedded files within files are not readily-accessible. Please do not provide the records in a single, or “batched,” .pdf file. We appreciate the inclusion of an index.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Hannah Connor
Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 2155
St. Petersburg, FL 33731
hconnor@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (202) 681-1676 to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The fee waiver amendments of 1986 were designed specifically to provide non-profit organizations such as the Center and Waterkeeper access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information" 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. The Center and Waterkeeper Qualify for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial

interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). EPA’s regulations, at 40 C.F.R. § 2.107(1)(2) and (3), establish the same standard.

Thus, EPA must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably-broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 40 C.F.R. § 2.107(1)(2). As shown below, the Center and Waterkeeper meet each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of EPA. This request asks for all of the following records from EPA: (1) all records, including all communications with the North Carolina Governor's office, any state agency, or between Region 4 and any other EPA regional office or the DC office, generated as part of EPA's review, consultation, or response to flooding of animal agricultural operations in North Carolina as a result of Hurricane Matthew, and (2) all records related to any emergency response or preparedness plan, proposal, strategy, suggestion, or other response resulting from any storm-related flooding of any animal agricultural operation in North Carolina as a result of flooding from Hurricanes Matthew, Floyd, Bonnie, or Fran.

All of these requested records relates to EPA's response to environmentally hazardous situations that threatened the public health and welfare. When an animal agricultural operation - especially a large industrial animal feeding operation - floods, it subjects the surrounding environment to a variety of biological and chemicals contaminants. Such contaminants can include, but are not limited to, concentrated animal waste, often resulting from a breach or spill from a waste impoundment; pesticides or other pharmaceuticals used or stored on the property or in spilled animal waste; and farm animal carcasses.

This FOIA will provide the Center, Waterkeeper, and the public with crucial insight into EPA’s involvement and response to the flooding of animal agricultural operations in North Carolina, both as it relates to the agency's specific response to the effects from Hurricane Matthew earlier this fall, and to its emergency preparedness and response in consideration of prior similar storm-related flooding events documented to have occurred in North Carolina at animal agricultural operations.

It is clear that reviewing EPA's response to flooding at animal agricultural operations from hurricane-events is a specific and identifiable activity of the government. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center and Waterkeeper meet this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Center and Waterkeeper to convey to the public, including their membership, information about whether EPA provides adequate emergency planning and response to storm-flooding at animal agricultural operations in North Carolina. EPA's response to the discharge of pollutants from these operations during major storm events speaks to both its protection of the public health and welfare, and to its activities as it relates to oversight and enforcement of the Clean Water Act. Flooding from animal agricultural operations - especially large concentrated animal feeding operations, which are point sources under the Clean Water Act - is understood to have occurred during each of the listed hurricane events, and to have affected numerous jurisdictional rivers and streams in North Carolina, including but not limited to the Neuse River basin, the Cape Fear River basin, and the Tar-Pamlico River basin.

Once the information is made available, the Center and Waterkeeper will analyze the information and make it available to their members. For example, the Center will make the information available to its 1.1 million members and online activists and the general public in a manner that will meaningfully enhance the public's understanding of EPA's oversight and response to storm-related discharges from animal agricultural operations in the state of North Carolina. Waterkeeper will also make this information available to its members, which include community and river advocates who focus exclusively on the health of the Neuse, Cape Fear, and Tar-Pamlico Rivers.

Thus, the requested records are likely to contribute to an understanding of EPA operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of EPA's Oversight of Animal Agricultural Operations in North Carolina.

The requested records will contribute to public understanding of EPA's involvement in responding to and overseeing discharges from animal agricultural operations - including large concentrated animal feeding operations - during and following large storm event in North Carolina. As explained above, the records will contribute to public understanding of EPA's efforts to protect human health and the environment, and to ensure that discharges into waters of the United States will not have an unacceptable adverse effect on water quality, municipal water supplies, shellfish beds and fish areas, wildlife, or recreational areas.

As continuing news coverage indicates, EPA's involvement in preparing for and responding to flooding from animal agricultural operations is an area of interest to a reasonably-broad segment of the public. As detailed by the Wall Street Journal, flooding from Hurricane Matthew this fall resulted in the drowning death of at least 1.8 million chickens and 4,800 hogs, "posing a

challenge for ... the state's emergency management staff," raising carcass disposal and public-health concerns. See Kelsey Gee & Cameron McWhirter, *North Carolina's Poultry, Hog Producers Bail Out from Under Hurricane Matthew*, Wall Street Journal (Oct. 15, 2016), available at <http://www.wsj.com/articles/north-carolinas-poultry-hog-producers-bail-out-from-under-hurricane-matthew-1476554376>. The article goes on to detail further environmental and public health concerns related to discharges of animal waste from flooded waste impoundments, and to discuss the legacy of these types of events occurring in North Carolina. Further, after Hurricane Matthew, Waterkeeper documented flooding in at least 140 swine and poultry confinement buildings and 14 waste impoundments, and thereafter shared that information with the general public, as it intends to do with the information requested herein. Environmental Working Group, *Aerial Photos Document Massing Flooding of 36 Factory Farms* (Nov. 4, 2016), available at <http://www.ecowatch.com/factory-farms-flood-hurricane-matthew-2079212132.html>.

The Center, for example, will use the information it obtains from the disclosed records to educate the public at large about the adequacy of EPA's actions in generating emergency response protocols and responding to flooding of animal agricultural operations as a result of large storm events. See *W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

Through the Center's and Waterkeeper's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), cert. denied, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cnty. Legal Servs. v. Dep't of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate the requested records because that information is not currently in the public domain. See *Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...".¹

¹ In this connection, it is immaterial whether any portion of the Center's or Waterkeeper's request may currently be in the public domain because the requests is considerably broader than any piece of information that may currently be available to other individuals. See *Judicial Watch*, 326 F.3d at 1315.

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of EPA’s efforts to protect human health and the environment, and to ensure that discharges into waters of the United States will not have an unacceptable adverse effect on water quality, municipal water supplies, shellfish beds and fish areas, wildlife, or recreational areas. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of EPA’s efforts to protect human health and the environment, and to ensure that discharges into waters of the United States will not have an unacceptable adverse effect on water quality, municipal water supplies, shellfish beds and fish areas, wildlife, or recreational areas, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about not only EPA’s response to flooding conditions that have already occurred, but also to understand how it is likely to respond to similar flooding events in the future.

The records are also certain to shed light on EPA’s activities under the CWA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center and Waterkeeper meet this factor as well.

II. The Center and Waterkeeper have a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center’s fee-waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public’s understanding of the government’s operations or activities; (2) that the information enhances the public’s understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center’s track record of active participation in oversight of governmental activities and decisionmaking, and its consistent contribution to the public’s understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,000 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. In 2014, more than 1.5 million people visited the Center's extensive website, viewing a total of more than 5.7 million pages. The Center sends out more than 350 email newsletters and action alerts per year to more than 1.1 million members and supporters. Three times a year, the Center sends printed newsletters to more than 50,000 members. More than 146,900 people have "liked" the Center on Facebook. The Center also regularly tweets to more than 45,500 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Waterkeeper is also well-equipped to analyze and disseminate the requested information. As a grassroots organization with a strong member base in North Carolina, Waterkeeper would use this information to contribute to the public's understanding of the government's response to widespread flooding of animal operations before, during, and after hurricane events - particularly as it relates to Hurricane Matthew. Waterkeeper disseminates this type of information in a number of ways. First, by providing the information to its North Carolina member programs, including the Neuse Riverkeeper Programs, the Cape Fear Riverkeeper, and the Pamlico-Tar Riverkeeper, with the suggestion that they further distribute the information to their individual membership and to the general public. Second, by distributing the information through state and national media by way of press releases or other documents for general public consumption. And third, by disseminating the information through Waterkeeper's extensive organizational website, which is readily available to the public at <http://www.waterkeeper.org>.

Public oversight and enhanced understanding of EPA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably-broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center and Waterkeeper need not show how they intend to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient to show how requestors distribute information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Center or Waterkeeper.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's and Waterkeeper's role of educating the general public.

Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.1 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

Waterkeeper, likewise, is a 501(c)(3) nonprofit conservation organization that supports a global network of grassroots leaders to hold polluters accountable and fight for every community's right to swimmable, drinkable, and fishable waters. Waterkeeper has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, this request qualifies for a full fee-waiver. We hope that EPA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at hconnor@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

/s/ Hannah Connor

Hannah Connor

Staff Attorney

CENTER FOR BIOLOGICAL DIVERSITY

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